ISITO ELECTRONICS SDN BHD

v.

TEH AH KIAM & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
RAMLY ALI J
[CIVIL SUIT NO: D5-22-968-2001]
13 NOVEMBER 2003

CONTRACT: *Breach - Sale and purchase of goods - Goods of winding-up company sold by defendant/receiver and manager - Liability for missing goods - Whether upon defendant - Whether defendant sold goods in capacity as receiver and manager and not personally liable - Contracts Act 1950, ss. 1(2), 179, 183, 184 - Companies Act 1965, s. 183(1)*

COMPANY LAW: *Receivership - Receiver and manager - Defendant/receiver and manager transacted contract on behalf of company for sale of goods - Liability for missing goods - Whether upon defendant - Whether defendant sold goods in capacity as receiver and manager and not personally liable - Contracts Act 1950, ss. 1(2), 179, 183, 184 - Companies Act 1965, s. 183(1)*

The plaintiff commenced this action against the defendant who was the receiver and manager of a company ('the company') in winding-up. The action was in respect of goods belonging to the company purchased from the defendant under a contract ('the contract'). The plaintiff complained that some of the goods were missing upon collection and argued that the defendant was liable for them under the contract. The issues were: (1) whether the defendant was an agent for the company in the sale of the goods; (2) whether the defendant was personally liable under the contract; (3) whether the defendant assumed contractual liability; (4) whether the defendant owed a duty of care to the plaintiff; (5) whether the defendant was a bailee in respect of the goods; and (6) whether the defendant was liable for any loss incurred by the plaintiff and should compensate accordingly.

Held (dismissing plaintiff's claim):

[1] It was not disputed that the defendant was appointed as receiver and manager of the company under the terms of a debenture involving the company and a bank. The appointment and authority to act as agent was therefore expressed in writing. This fact was clearly communicated to the plaintiff in the letters preceding the sale of the goods. The

plaintiff had agreed to this fact when it signed the counter offer for the sale of the goods. In the circumstances, the defendant was acting as agent of the company in the sale of the charged assets of the company. (p 278 a-g)

[2] The defendant having disclosed that he acted as an agent of the company in the respective letters to the plaintiff was not personally bound by the terms of the contract he made on behalf of the company (ss. 179 and 183 of the Contracts Act 1950 ('the Act')). (pp 278 h & 279 b-d)

[3] The agent can only be personally liable if he contracts as if he is the principal and the actual principal is not disclosed to the other party (s. 184(a) of the Act). In the present case, the defendant did disclose that the principal was the company. It was also clearly indicated to the plaintiff that the defendant was only acting as an agent of the company and took no personal liability under the contract. The plaintiff agreed to this condition by signing the acceptance to the offer made by the defendant. Further, the letters by the plaintiff's solicitors to the company were evidence of the fact that the contract was between the plaintiff and the company. As such, the defendant did not assume any responsibility or liability arising from the contract. Such a contract was enforceable by the company (being the principal) and the company alone was liable under it. (pp 279 f-g & 280 a-d)

[4] There was no duty of care imposed on the defendant by statute, common law or under the debenture to purchasers of the company's assets sold in the capacity as receiver and manager of the company. The duties of the defendant were owed to the company. Any action in respect of the acts of the defendant as agent should be directed to the company. As such, the defendant as receiver and manager owed no duty either in contract or in tort to the plaintiff. Such a duty arose only if there was bad faith on the part of the defendant and this was not pleaded. (pp 280 f-h & 281 e-g)

[5] The defendant would only be liable to safeguard the plaintiff's goods if the defendant undertook to do so but there was no such agreement to that effect. In fact, the defendant expressly excluded any liability under the contract. (p 281 h)

[6] The plaintiff did not plead the issue of bailment in its statement of claim but only raised it in submission. As the plaintiff was bound by its pleadings, this issue was therefore not before the court for decision. In any event the defendant could not be a bailee of goods by virtue only

of custody, care and control of the goods. Section 101 of the Act clearly stipulates that there must be a contract of bailment before the question of bailment arises. It followed that the question relating to duty of care as well as liability as provided under ss. 104 and 105 of the Act did not arise. (pp 282 a-b, e-h & 283 a, c)

[7] The Act (particularly s. 1(2)) does not restrict the freedom of contracting parties to decide upon what terms they desire to contract unless they are clearly inconsistent with the Act. In the present case, the defendant clearly excluded liability under the contract. (p 283 e)

[8] That the defendant was liable for the loss of goods and should compensate for them was a non-issue as there was no contract between the plaintiff and the defendant personally in respect of the goods concerned. (p 284 a)

Case(s) referred to:

Downsview Nominees Ltd v. First City Corp Ltd [1993] 3 All ER 627 ***(refd)***
Lathia v. Dronsfield Bros [1986] BCLC 321 ***(refd)***
Ooi Boon Leong & Ors v. Citibank [1984] 1 MLJ 222 ***(refd)***
Pernas Trading Sdn Bhd v. Persatuan Peladang Bakti Melaka [1979] 2 MLJ 124 ***(refd)***
Photo Production Ltd v. Sucuricor Transport Ltd [1980] AC 827 ***(refd)***
Public Bank Bhd v. Ng Chee Ping & Anor [1999] 2 CLJ 505 HC ***(refd)***
Robert Bosch (SEA) Pte Ltd v. Goh Ban Huat Bhd [1996] 1 AMR 714 ***(refd)***
The Chartered Bank v. Yong Chen [1974] 1 MLJ 151 ***(refd)***
Yew Wan Leong v. Lai Kok Chye [1990] 1 CLJ 1113; [1990] 1 CLJ (Rep) 330 SC ***(refd)***

Legislation referred to:

Companies Act 1965, s. 183(1)
Contracts Act 1950, ss. 1(2), 101, 104, 105, 135, 139, 140, 179, 183, 184(a)
Rules of the High Court 1980, O. 14A

For the plaintiff - Gamesh Perumal; M/s Ringo Low & Assoc
For the defendant - Izabella De Silva; M/s Iza Ng Yeo & Kit

Reported by Usha Thiagarajah

JUDGMENT

Ramly Ali J:

The plaintiff's claim against the defendant is for RM519,250 arising from a contract whereby the plaintiff agreed to purchase certain goods belonging to R.C. Centronix Electronic (M) Sdn Bhd (under the receivership) (hereinafter referred to as "the company"). The defendant was at all material times appointed as Receiver and Manager of the Company on 30 January

1995 by DCB Bank Bhd., pursuant to the power contained in a debenture and continued to perform his duties until 6 February 1998. The plaintiff alleges that the defendant has failed to deliver the goods to the plaintiff as agreed resulting in this present suit.

The relevant facts of the case are not in dispute. Thus, as directed by the court and as has been agreed by the parties the present suit is to be dealt with under O. 14A of the Rules of the High Court 1980 (RHC), to determine the liability of the defendant in respect of the goods purchased where the defendant was acting in a capacity as a Receiver and Manager.

Brief Facts

The defendant was appointed as Receiver and Manager of the Company under the terms of the debenture entered into by the company and DCB Bank Bhd.

On 6 March 1995, an invitation to submit an offer for purchase of goods belonging to the company was sent to the plaintiff *vide* letter dated 6 March 1995. The said letter was signed by Price Waterhouse Associates Sdn Bhd for and on behalf of the defendant acting as Receiver and Manager of the Company. In response, the plaintiff, *vide* its letter dated 13 March 1995, made an offer to purchase the goods at the price of RM150,000. This letter was addressed to Price Waterhouse Associates Sdn Bhd for attention of the defendant and refers to the company. After that the defendant, acting as Receiver and Manager of the Company made a counter offer *vide* letter dated 11 April 1995. This letter was signed by the defendant in his capacity as Receiver and Manager of the Company. In the counter offer, it was stipulated that the defendant was agreeable to sell the said goods for RM220,000 and not at the price of RM150,000 earlier offered by the plaintiff. As part of the transaction, the plaintiff was to pay a sum of RM30,000 as refundable deposit and a bank guarantee in the sum of RM170,000 for Customs Duty and Sales Tax for the goods.

Payment of the sum RM220,000 was made by the plaintiff by cheque made out in the name of the company and was banked in on 14 April 1995 into the company's bank account. On 21 April 1995, *vide* a letter from the plaintiff addressed to the defendant as Receiver and Manager of the Company, the plaintiff forwarded the following:

(a) Bank Guarantee in the sum of RM170,000, which records that it was issued as required "by a contract between the plaintiff and the company for the purchase of assets belonging to the company";

(b) A cheque for RM30,000 – made out to the company and banked into the company's bank account.

It is not disputed that a contract was concluded on 11 April 1995 for the sale and purchase of the goods.

Thereafter, the plaintiff by its servants and agents commenced gradual removal of the goods purchased. The plaintiff complained that certain items of the goods were missing and thus cannot be collected by the plaintiff. The plaintiff immediately informed the defendant *vide* its letter dated 17 April 1995 about the missing goods and demanded for the delivery of the some.

Plaintiffs Arguments

The plaintiff argues that the liability of a Receiver and Manager is a kin to a simple contract involving an offer, acceptance and consideration. In this case, the plaintiff contends that an invitation to treat was made by the defendant wherein the plaintiff made an offer to purchase the goods for RM150,000. Subsequently the defendant made a counter offer stating that the goods were to be sold for RM220,000. The plaintiff accepted the counter offer. Later the plaintiff paid for the purchase price. The plaintiff further contends that there was a binding contract between the plaintiff and the defendant and when certain items of the goods were missing, the defendant had breached the contract and liable for damages suffered by the plaintiff.

The plaintiff also argues that the defendant, as a Receiver and Manager of the Company owes a duty of care in contract or in tort to ensure that the goods which were bought by the plaintiff are ready and available for collection by or delivery to the plaintiff. The plaintiff alleges, in this case, the defendant who was in full control of the affairs of the company as well as in full custody and care of the goods has failed to take necessary steps to safeguard the goods before delivery to the plaintiff. The plaintiff contends that the defendant in the present case is a bailee in respect of those goods, as stipulated under the explaination to s. 101 of the Contracts Act 1950.

Eventhough there are exclusion clauses in the contract, the plaintiff submits that the defendant in this case cannot exclude liability under contract or tort and therefore statutory liability as provided under ss. 104 and 105 of the Contracts Act 1950 shall apply.

Defendant's Arguments

The defendant, on the other hand argues that in the whole transaction relating to the sale of the goods, the defendant as a Receiver and Manager was merely acting as an agent of the company and therefore not at any time personally bound by the contract which was principally entered by the company and the plaintiff. The defendant further submits that the defendant did not personally assume any contractual liability arising from the said contract and therefore does not owe any duty of care towards the plaintiff as alleged by the plaintiff. On the question of the defendant being a bailee as raised by the plaintiff, the defendant argues that it does not arise in the present case. The defendant also argues that the exclusion clauses as found in the offer letter which was agreed by the plaintiff and the defendant are applicable and therefore, the defendant has effectively excluded all personal liabilities in relation to the contract with the company. Finally the defendant also argues that the defendant did not owe any duty of care to the plaintiff and therefore not liable to the plaintiff for any alleged negligence in carrying out his duties as Receiver and Manager of the Company (which was under receivership at the material times). The defendant submits that the plaintiff had sued the wrong party and contends that the proper party to the suit should have been the company and not the defendant.

Issues To Be Determined

The issues that need to be determined by the court in this suit are as follows:

(a) Whether the defendant was acting an agent of the company in the sale of the goods;

(b) Whether the defendant was personally bound by the sale and purchase contract entered into between the plaintiff and the company for the sale of the goods belonging to the company (under receivership);

(c) Whether the defendant assumes any contractual liability arising from the said sale and purchase contract;

(d) Whether the defendant owes any duty of care to the plaintiff under or in respect of the sale and purchase contract;

(e) Whether the defendant was a bailee in respect of those goods;

(f) Whether the defendant as Receiver and Manager can exclude statutory liability under ss. 104 and 105 of the Contracts Act 1950;

(g) Whether the defendant is liable for any loss of the goods and to compensate the plaintiff.

First Issue: Whether The Defendant Was Acting As An Agent Of The Company In The Transaction

It is not disputed that the defendant was appointed as Receiver and Manager of the Company under the terms of a debenture involving the company and DCB Bank Bhd (the bank). The appointment and authority to act as agent is therefore expressed in writing. By s. 8.02(c) of the debenture it was expressly agreed by the company that the Receiver and Manager so appointed shall be deemed to be the agent of the company and that the company would be responsible for his acts and defaults. By s. 8.06 of the debenture, the Receiver and Manager was granted a Power of Attorney to act for the company and such acts had the same effect as acts of the company. Under s. 8.03(a) and (c) the defendant as an agent of the company has the necessary power to take possession of the assets of the company and to sell them.

This fact was clearly communicated to the plaintiff in the letters preceding the sale ie, letters dated 6 March 1995 and 11 April 1995. In the first letter dated 6 March 1995 (para. 4) it is clearly stated:

> I, as joint receiver will enter into the sale, **solely as agent of the Company** and will not undertake personal liability in respect of the contract.

Subsequently, in the counter offer letter dated 11 April 1995, again it is clearly stated:

> It is acknowledged that the Receiver acts as agent of the Company and does not adopt any agreement between you and the Company or accept any personal liability thereunder.

The plaintiff signed the counter offer signifying its agreement to the fact.

Under the circumstances, the first issue ought to be determined in the affirmative namely that under the terms of the debenture, the defendant acts as an agent of the company in the sale of the charged assets of the company.

Second Issue: Whether The Defendant Was Personally Bound By The Said Contract Between The Plaintiff And The Company For The Sale Of The Goods

The court finds that the defendant having disclosed that he acts as an agent of the company in the respective letters, is not personally liable or bound by the terms of the contract, he made on behalf of the company with the plaintiff on 11 April 1995.

Section 135 of the Contracts Act 1950 (the Act) defines "an agent" as a person employed to do any act or represent another in dealings with third parties. Section 139 of the Act provides that the authority of the agent may be expressed or implied. Section 140 provides that the authority is said to be expressed when it is given by words, spoken or written.

Further, s. 179 of the Act provides that a contract entered into by an agent and obligations arising therefore will have the same legal consequences as if the contract had been entered into and acts done by the principal. Finally, s. 183 of the Act provides that in the absence of any contract to that effect, an agent cannot personally enforce a contract entered into by him as an agent nor is he personally bound by it. The agent may only be bound personally by the contract in the following circumstances:

(a) if an agent makes a contract for sale of goods belonging for a principal residing overseas;

(b) where the principal is not disclosed;

(c) where the principal though disclosed cannot be sued.

Applying the above statutory provisions (particularly s. 179 and 183 of the Act) to the facts of the present case, the court is convinced that the defendant is not personally bound by the contract entered into between the plaintiff and the company. None of the exceptions as provided under s. 183 of the Act is applicable into the facts of the present case.

Third Issue: Whether The Defendant Assumes Any Contractual Liability Arising From The Said Contract

Section 184(a) of the Contracts Act 1950 is relevant to this issue. It provides:

> If an agent makes a contract with a person who neither knows, nor has reason to suspect, that he is an agent, his principal may require the performance of the contract; but the other contracting party has, as against the principal, the same rights as he would have had as against the agent if the agent had been the principal.

Under the provisions, the agent can only be personally liable, if he contracts as if he is the principal and the actual principal is not disclosed to the other party.

In a leading case of *Pernas Trading Sdn Bhd v. Persatuan Peladang Bakti Melaka* [1979] 2 MLJ 124, the agent did not disclose the fact in the document that he was acting as an agent in entering into contract. The Federal Court held that "if an agent contracts in such a forum as to makes himself liable personally, whether his principal was or was not known, he cannot afterward relieve himself of the responsibility."

In the present case, the fact that the principal is the company was disclosed by the defendant as stipulated in the offer letters dated 6 March 1995 and 4 April 1995. It was also clearly indicated to the plaintiff in those letters that "the defendant was only acting as an agent of the company and takes no personal liability in the contract". The plaintiff agreed to this condition by signing the acceptance to the earlier offer. The fact that the contract was between the company (not the defendant personally) and the plaintiff is also evidenced by letters dated 29 May 1995, 2 June 1995 and 10 August 1995 written by the plaintiff's solicitors to the company.

As such, the court is satisfied that the defendant in the present case did not assume any responsibility or liability arising from the said contract. Such a contract is enforceable by the company (being the principal) and the company alone is liable under it.

Fourth Issue: Whether The Defendant Owes Any Duty Of Care To The Plaintiff Under Or In Respect Of The Contract

In the statement of claim (paras 14-15) the plaintiff alleges that the defendant was negligent in carrying out his duties and had committed breach of trust in respect of the company's goods by allowing some of them to be removed.

The court is of the view that there is no duty imposed by statute, common law or the debenture on the defendant towards purchasers of the assets of the company sold by the defendant merely as Receiver and Manager of the Company. As provided under s. 183(1) of the Companies Act 1965, the receiver is personally liable for services rendered, goods purchased or property hired, leased, used or occupied.

The duties of the defendant as Receiver and Manager in respect of the agency are owed to the company whose agent he was at the material time. As such, any action in respect of the acts of the defendant as agent for negligence or breach of trust should be directed to the company.

In *Downsview Nominees Ltd v. First City Corp Ltd* [1993] 3 All ER 627, the Privy Council held that there is no general duty of care owed by a receiver in the general administration of the receivership. This decision was followed by our High Court in *Public Bank Bhd v. Ng Chee Ping & Anor* [1999] 2 CLJ 505 where it was held that the Receiver and Manager owes no general duty in negligence to mortgagor or subsequent encumbrance to use reasonable care in exercising his powers in dealing with the company's assets; equity however imposed a duty to exercise the powers in good faith for the purpose of obtaining repayment.

In another case, *Lathia v. Dronsfield Bros* [1986] BCLC 321, which was cited with approval in *Ng Chee Ping* case, the court allowed the receiver's application to strike out an action against them as showing no reasonable cause of action. In that case it was held:

> the second and third Defendants were by the terms of their appointment made the agents of the first Defendant Company in carrying out their function as Receivers and Managers and as agents were immune from a claim for inducing a breach of contract by their principal on whose behalf they had acted unless they had not acted *bona fide* or acted outside the scope of their authority. In addition the second and third Defendants did not owe a duty to the Company's creditors, their duties being owed to the Debenture holders and also as agents to the company.

Based on the above authorities, the court concludes that the defendant, as Receiver and Manager, owes no duty either in contract or in tort towards the plaintiff as alleged by the plaintiff in the statement of claim. Such duty must be equitable and arises only when there is a sale of the assets which must be made in good faith for the purpose of obtaining repayment.

There is no evidence to show that the defendant in the present case was acting in bad faith *(mala fide)* in the whole transaction. In any event, 'bad faith *(mala fide)*' is not pleaded by the plaintiff. As stated by the court in *Ng Chee Ping*'s case, "... it must be noted that an allegation of failure to act in good faith is tantamount to an allegation of fraud and which allegation must be expressly pleaded and sufficiently particularized."

The defendant would only be liable to safeguard the plaintiff's goods if the defendant undertook to do so. However, in this case, there is no evidence of any agreement to that effect. In fact, the defendant expressly excluded any liability under the said contract. Therefore, the court can safely conclude that the defendant owes no duty towards the plaintiff as alleged by the plaintiff.

Fifth Issue: Whether The Defendant Was A Bailee In Respect Of The Goods Purchased By The Plaintiff

The issue of the defendant being a 'bailee' was raised by the plaintiff in its submission. The plaintiff's statement of claim has not pleaded this issue. It is therefore not before this court for decision. The plaintiff is bound by the pleadings. This issue must be pleaded. Only issues raised in the pleadings can be decided and determined in the proceedings. In this respect, the court refers to a Supreme Court case of *Yew Wan Leong v. Lai Kok Chye* [1990] 1 CLJ 1113; [1990] 1 CLJ (Rep) 330 where it was held that "the court is not entitled to decide a suit on a matter which no issue has been raised by the parties ...".

A judgment based on an issue not pleaded would be set aside. This is what happened in *The Chartered Bank v. Yong Chen* [1974] 1 MLJ 151, where the Federal Court held "as the trial judge had decided on an issue not raised on the pleadings, the judgment must be set aside and a new trial ordered."

In any event, even if the court is prepared to accept the issue (although not pleaded) for determination, the court is of the view that the defendant, as Receiver and Manager cannot be a bailee of goods by virtue only of custody, care and control over the goods. The plaintiff relies on s. 101 of the Contracts Act 1950 to support its submission that the defendant was a bailee for the goods in question s. 101 provides:

> 101. A "bailment" is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The person delivering the goods is called the "bailor". The person to whom they are delivered is called the "bailee".
>
> Explanation – If a person already in possession of the goods of another contracts to hold them as a bailee, he thereby becomes the bailee, and the owner becomes the bailor, of such goods, although they may not have been delivered by way of bailment.

The section (as in the Explanation) clearly stipulates that there must be a contract of bailment before the question of bailment arises in order for the relevant sections of the Contracts Act 1950 can be relied upon. The Receiver and Manager must contract with the plaintiff to hold the goods as bailee pending delivery to the plaintiff.

In the present case there is no contract of bailment pleaded and there is no evidence in any document that there was such a contract between the defendant and the plaintiff. Therefore, the question of liability on part of the defendant as a bailee does not arise.

Sixth Issue: Whether The Defendant Can Exclude Statutory Liability Under Sections 104 And 105 Of The Contracts Act 1950

The plaintiff argues that as a bailee, the defendant is bound to take as much care of the goods in question as provided under s. 104 of the Contracts Act 1950.

In the first place, the court has determined above that the defendant was not a bailee and therefore the question of bailment does not arise. It follows that the question relating to duty of care as well as liability of a bailee as provided under ss. 104 and 105 of the Contracts Acts also does not arise in this case.

In any event, even if s. 104 is to be considered, the court is of the view that the extent of care to be taken by a bailee under the said section can by agreement be contracted out by the parties. This was decided by the Privy Council in *Ooi Boon Leong & Ors v. Citibank* [1984] 1 MLJ 222. The Contracts Act 1950 (particularly s. 1(2) does not restrict the freedom of contracting parties to decide upon what terms they desire to contract, unless they are clearly inconsistent with the Act.

In the present case, the exclusion of liability of the defendant was clearly stipulated in the letters dated 6 March 1995 and 11 April 1995. The clause is clear and unambiguous and the clear words should be given effect to. The exclusion clause has been agreed to by the plaintiff and the said clause clearly states that the receiver is not accepting any personal liability under the contract he signed as an agent. This would include contractual and tortuous liability in negligence. In this respect, the court is in full agreement with Abdul Malek Hj. Ahmad J (as he then was) in *Robert Bosch (SEA) Pte Ltd. v. Goh Ban Huat Bhd.* [1996] 1 AMR 714 when he cited the House of Lords's case of *Photo Production Ltd. v. Sucuricor Transport Ltd* [1980] AC 827 where it was held as follows:

> that the question whether and to what extent an exclusion clause was to be applied to any breach of contract was a matter of construction of the contract and normally when parties were bargaining on equal terms they should be free to apportion the risks as they thought fit, making provision for their respective risks according to the terms they chose to agree ... .

Seventh Issue: Whether The Defendant Is Liable For Any Loss Of The Goods And To Compensate The Plaintiff

As has been determined above, there was no contract between the plaintiff and the defendant personally in respect of the said goods purchased by the plaintiff. There was no breach of contract or any duty of care by the defendant. Therefore, the question relating to the defendant's liability for any loss of the goods and to compensate the plaintiff does not arise.

If at all the defendant was negligent in performing his duties as Receiver and Manager, the cause of action would belong to the company (as principal) and to the debenture holder but not to the plaintiff to whom no general duty is owed by the defendant. Therefore the defendant is not liable to the plaintiff for the alleged loss and compensation. If at all the plaintiff had suffered loss, then the proper party to be sued is the company, but not the defendant.

Conclusion

In the circumstances and based on the above considerations, the plaintiff's claim against the defendant is dismissed with costs.